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In the
Supreme Court of the United States.

OCTOBER TERM, 1985.

No. 84-495
RICHARD THORNBURGH, ET AL.
APPELLANTS
v.
AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, ET AL.
APPELLEES

No. 84-1379
EUGENE F. DIAMOND, ET AL.
APPELLANTS
v.
ALLAN G. CHARLES, ET AL.
APPELLEES

ON APPEAL FROM THE UNITED STATES COURTS OF APPEALS FOR THE THIRD AND SEVENTH CIRCUITS.

Brief Amicus Curiae of Senator Bob Packwood (R-Ore.), Representative Don Edwards (D-Calif.) and Certain Other Members of the Congress of the United States in Support of Appellees.

LAURENCE H. TRIBE
Counsel of Record
SUSAN ESTRICH
MARTHA MINOW
KATHLEEN M. SULLIVAN
Counsel for Amici
1525 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4621

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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Interest of Amici.

Amici are 81 members of the Congress of the United States, as follows:

Rep. Gary L. Ackerman (D-N.Y.), Rep. Glenn M. Anderson (D-Calif.), Rep. Chester G. Atkins (D-Mass.), Rep. Les

AuCoin (D-Ore.), Rep. Howard L. Berman (D-Calif.), Rep. Anthony C. Beilenson (D-Calif.), Rep. Barbara Boxer (D-Calif.), Sen. Bill Bradley (D-N.J.), Rep. George E. Brown, Jr. (D-Calif.), Rep. Sala Burton (D-Calif.), Sen. John H. Chafee (R-R.I.), Rep. Cardiss Collins (D-Ill.), Rep. John Conyers, Jr. (D-Mich.), Rep. George W. Crockett, Jr. (D-Mich.), Rep. Ronald V. Dellums (D-Calif.), Rep. Julian C. Dixon (D-Calif.), Sen. Christopher J. Dodd (D-Conn.), Rep. Thomas J. Downey (D-N.Y.), Rep. Mervyn M. Dymally (D-Calif.), Rep. Bob Edgar (D-Pa.), Rep. Don Edwards (D-Calif.), Sen. Daniel J. Evans (R-Wash.), Rep. Lane Evans (D-Ill.), Rep. Dante B. Fascell (D-Fla.), Rep. Vic Fazio (D-Calif.), Rep. Barney Frank (D-Mass.), Sen. Barry Goldwater (R-Ariz.), Rep. William H. Gray, III (D-Pa.), Rep. Bill Green (R-N.Y.), Rep. Augustus F. Hawkins (D-Calif.), Rep. Charles A. Hayes (D-Ill.), Sen. Daniel K. Inouye (D-Hawaii), Sen. Nancy Landon Kassebaum (R-Kan.), Rep. Robert W. Kastenmeier (D-Wis.), Sen. Edward M. Kennedy (D-Mass.), Sen. John F. Kerry (D-Mass.), Sen. Frank R. Lautenberg (D-N.J.), Rep. Richard H. Lehman (D-Calif.), Rep. William Lehman (D-Fla.), Rep. Mickey Leland (D-Tex.), Rep. Sander M. Levin (D-Mich.), Rep. Mel Levine (D-Calif.), Rep. Mike Lowry (D-Wash.), Rep. Stan Lundine (D-N.Y.), Rep. Edward J. Markey (D-Mass.), Rep. Robert T. Matsui (D-Calif.), Rep. John R. McKernan, Jr. (R-Maine), Rep. Stewart B. McKinney (R-Conn.), Sen. Howard M. Metzenbaum (D-Ohio), Rep. George Miller (D-Calif.), Rep. Norman Y. Mineta (D-Calif.), Rep. Parren J. Mitchell (D-Md.), Rep. Jim Moody (D-Wis.), Rep. Bruce A. Morrison (D-Conn.), Rep. Robert J. Mrazek (D-N.Y.), Rep. Major R. Owens (D-N.Y.), Sen. Bob Packwood (R-Ore.), Rep. Claude Pepper (D-Fla.), Rep. Charles B. Rangel (D-N.Y.), Rep. Gus Savage (D-Ill.), Rep. James H. Scheuer (D-N.Y.), Rep. Claudine Schneider (R-R.I.), Rep. Patricia Schroeder (D-Colo.), Rep. Charles E. Schumer (D-N.Y.), Rep. John F. Seiberling (D-Ohio), Rep. Olympia J. Snowe (R-Maine),

Rep. Stephen J. Solarz (D-N.Y.), Rep. Fortney H. Stark (D-Calif.), Rep. Louis Stokes (D-Ohio), Rep. Gerry E. Studds (D-Mass.), Rep. Edolphus Towns (D-N.Y.), Rep. Robert G. Torricelli (D-N.J.), Rep. James A. Traficant, Jr. (D-Ohio), Rep. Morris K. Udall (D-Ariz.), Rep. Henry A. Waxman (D-Calif.), Rep. James Weaver (D-Ore.), Sen. Lowell T. Weicker, Jr. (R-Conn.), Rep. Ted Weiss (D-N.Y.), Rep. Alan Wheat (D-Mo.), Rep. Howard Wolpe (D-Mich.), Rep. Sidney R. Yates (D-Ill.).

As members of a co-ordinate branch of government, sworn to uphold the Constitution in the face of the most intense political controversy, *Amici* submit this brief[1] in the conviction that the vision of the judicial function and of individual liberty espoused by the Government in these cases is radically at odds with the written Constitution, with the position urged heretofore by the United States in this Court, and with the judiciary's traditional role as a principled and independent guardian of constitutional liberties.

Summary of Argument.

The Government, in urging that *Roe* v. *Wade* be overturned, has taken an extraordinary and unprecedented step. For the first time in the history of the Solicitor General's office, in a case in which the United States is not even a party, and a case in which the issue was not presented by the parties, the Department of Justice has urged the repudiation of a liberty long since declared fundamental by this Court.

The Government would have the Supreme Court toss into the political arena the right to choose between childbirth and abortion. For little reason beyond the indisputable difficulty of the issues posed and the intense controversy invited, the Government would relegate this delicate constitutional matter to shifting political majorities in the 50 state legislatures, yielding a bizarre quilt of wildly varying state laws. Whatever

[1] Counsel for all parties have consented to the filing of this brief. Letters indicating consent have been filed with the Clerk.

rights women might have in this matter would be disregarded in some states; whatever rights the unborn are thought to possess would be ignored in others. On a previous occasion when the nation was deeply divided over a different issue of fundamental liberty, Abraham Lincoln warned that the Union could not long endure "half slave and half free."[2]

The Government's ill-conceived resolution of the abortion controversy would not only fragment our constitutional order but turn it on its head. For it is precisely the task of this Court to insulate conflicting claims of individual right from the changing winds of politics. As in the case of school desegregation, it is often when public sentiment is most sharply divided that the independent judiciary plays its most vital national role in expounding and protecting constitutional rights. As the Chief Justice wrote in *Brown* v. *Board of Education* (*Brown II*), 349 U.S. 294, 300 (1955), "[t]he vitality of . . . constitutional principles cannot be allowed to yield simply because of disagreement with them."

Argument.

1. Only recently, in *Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416, 420 n.1 (1983), this Court enumerated the "especially compelling reasons for adhering to *stare decisis* in applying the principles of *Roe* v. *Wade*:"

> That case was considered with special care. It was first argued during the 1971 Term, and reargued — with extensive briefing — the following Term. The decision was joined by the Chief Justice and six other Justices. Since *Roe* was decided in January 1973, the Court repeatedly and consistently has accepted and applied the basic principle that a woman has a fundamental right to make the highly personal

[2] Speech in Springfield, Illinois (June 16, 1858).

choice whether or not to terminate her pregnancy. *See Connecticut* v. *Menillo*, 423 U.S. 9 (1975); *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976); *Bellotti* v. *Baird*, 428 U.S. 132 (1976); *Beal* v. *Doe*, 432 U.S. 438 (1977); *Maher* v. *Roe*, 432 U.S. 464 (1977); *Colautti* v. *Franklin*, 439 U.S. 379 (1979); *Bellotti* v. *Baird*, 443 U.S. 622 (1979); *Harris* v. *McRae*, 448 U.S. 297 (1980); *H.L.* v. *Matheson*, 450 U.S. 398 (1981).

In the name of "democratic self-governance,"[3] and in supposed analogy to this Court's decision in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 105 S.Ct. 1005 (1985), overruling *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), the Government — which had urged *stare decisis* in *Garcia* — now invites this Court to overrule *Roe* v. *Wade*, 410 U.S. 113 (1973). In so moving, the Government describes that decision as merely another "formulation affecting the allocation of constitutional powers" that has supposedly "proven 'unsound in principle and unworkable in practice.'" GB 21. But the Government adduces no relevant consideration that was not available in 1973[4] and points to no relevant development subsequent to *Akron* in 1983. More importantly, the Government's decision to treat the holding in *Roe* v. *Wade* as effecting only an "allocation of constitutional powers" utterly fails to distinguish between determining the proper distribution of power within government and defining the boundary that

[3] Government Brief ("GB") at 1.

[4] The protracted controversy to which the Government points hardly distinguishes the current situation from that which the Court confronted as early as 1973. Nor does the Government explain why a judgment made by application of fundamental constitutional principles should yield in the face of a measure of public dispute, or suggest how overruling *Roe* v. *Wade* could be expected to replace controversy with consensus.

separates the sphere of governmental power from the sphere of individual autonomy.

2. Stripped to its essentials, the Government's contention is that state legislatures should be accorded judicially unrestricted latitude in defining — and, if they choose, infringing — fundamental rights in this area. The "efforts of . . . state legislatures to balance the competing interests at stake in the abortion decision," GB 1, are described as though fundamental rights could properly be reduced to political interests. That may well be the case under a parliamentary government where the legislative will is supreme,[5] but it ignores the choice of a fundamentally different form of government that was made for us nearly two centuries ago:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. . . .
>
> Nor does our duty to apply the Bill of Rights to assertions of official authority depend upon our possession of marked competence in the field where the invasion of rights occurs. . . . [W]e act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence . . . withhold the judg-

[5] "The primary argument against a Bill of Rights [for Great Britain] is that it would . . . remove from Parliament a decision-making capacity which rightly belongs to Parliament. Disputes as to encroachments on fundamental rights are essentially political disputes and must be resolved politically, not judicially." P. Norton, *The Constitution In Flux* 253 (1982).

> ment that history authenticates as the function of this Court when liberty is infringed.[6]

Our entire history has made clear that, where controversy is greatest, so also are the dangers of majoritarian excess and the need for protection under the Constitution by an independent and principled judiciary. *See, e.g., United States* v. *Nixon,* 418 U.S. 683 (1974); *New York Times* v. *United States,* 403 U.S. 713 (1971); *Cooper* v. *Aaron,* 358 U.S. 1 (1958).

3. There is no claim that the deference to state legislatures for which the Government here clamors should be limited to abortion cases; nor could any such argument be made. The force of the Government's current analysis would be fully applicable whenever this Court is called upon to enforce constitutional rights on a case-by-case basis, and to draw the ever-finer lines that are necessitated by recurring instances of state or local resistance. In effect, the Government's position applies to constitutional rights to attend an integrated public school; to express unpopular political views; to decide whether to use contraception or, in consultation with a doctor, terminate a pregnancy. In each of these — and other — instances of constitutional liberties, the Government would evidently vest state and local legislatures with substantial power to define, or to ignore, the meaning of the United States Constitution.

The Government adduces no principled distinction between any of these fundamental rights and the fundamental right of privacy, for which the Government here urges a new federalism. Indeed, the more controversial the particular exercise of rights, the more willing the Justice Department seems to relegate the meaning of the Constitution to the state legislatures. This cannot be what the constitutional framework mandates.

4. In this case, like *Akron,* the litigants initially called upon this Court only to construe, not reexamine, *Roe* v. *Wade* itself.

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[6] *West Virginia Bd. of Educ.* v. *Barnette,* 319 U.S. 624, 638, 639-640 (1943).

But here, in contrast to its position in *Akron*,[7] the Government nonetheless urges such reexamination. It is perhaps unsurprising that a controversial precedent would be selected to carry this gratuitous plea for radical surgery on our form of government. But the results of such surgery would be felt throughout the body politic. For it is axiomatic that the undoing of one aspect of fundamental liberty threatens the protection of individual rights in every phase of American life. However desirable it might be for the states to experiment with traffic laws or liquor regulations or other quotidian matters, any "experiment" with our most basic liberties, as James Madison counseled two centuries ago, is cause only for immediate "alarm."[8]

5. The Government's current position invites just such an experiment — on the supposed authority of *Garcia*, even though the issue here is one readily distinguishable from anything at issue in *Garcia*. For that decision dealt only with "the allocation of constitutional powers" *within* government — *not* with the underlying distribution of power *between* government and the individual. Thus, in *Garcia*, this Court engaged in lively debate over the question of whether and to what degree the rights of *states*, as distinct from those of individuals, could properly be left to the national legislature for protection, relying on "the built-in restraints that our system provides through state participation in federal governmental action [to ensure] that laws that unduly burden the States will not be promulgated"

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[7] In argument before this Court in *Akron*, the Solicitor General expressly refrained from asking the Court to overrule *Roe* v. *Wade*:
Question: Mr. Solicitor General, are you asking that *Roe* v. *Wade* be overruled?
Mr. Lee: I am not, Mr. Justice Blackmun.
Question: Why not?
Mr. Lee: That is not one of the issues presented in this case, and as amicus appearing before the Court, that would not be a proper function for us. Tr. Oral Arg. p. 21.

[8] J. Madison, "Memorial and Remonstrance Against Religious Assessments," in *Everson* v. *Bd. of Education*, 330 U.S. 1, 65 (1947) (Appendix, Rutledge, J., dissenting).

in the first instance. 105 S.Ct. at 1020 (majority opinion). *Cf. id.* at 1025-26 & n.9 (dissenting opinion). But it was common ground for this Court in *Garcia* that no such question could even arise with respect to the rights of *individuals*: "One can hardly imagine this Court saying that because Congress [or a state legislature] is composed of [or represents] individuals, individual rights guaranteed by the Bill of Rights are amply protected by the political process." *Id.* at 1025 n.8 (Powell, J., joined by Burger, C.J., and Rehnquist and O'Connor, JJ., dissenting).

The repudiation of *National League of Cities* in *Garcia* represented only a determination that, with respect to the sovereign rights of *states*, this Court should return to its pre-1976 tradition of depending — within certain still-to-be elaborated "affirmative limits," *id.* at 1020 — on "the structure of the Federal Government itself" to defend the Constitution's boundaries on national legislative authority. *Id.* at 1018. Whether that determination was right or wrong, it bears no resemblance to the truly extraordinary suggestion that, with respect to the rights of individual *persons*, this Court should inaugurate the practice of depending on "ordinary politics . . . to settle disputes of value and vision" going to the very *content* of what those individual rights *are*. GB 30. Far from restoring to Congress this Court's long-standing allocation of responsibility for the claims of states *qua* states, the proposed overruling of *Roe* v. *Wade* would rest on a wholly novel investiture in state legislatures of an essentially unreviewable power to dispose of the competing claims of right advanced by individuals under the fundamental right of privacy — an investitute utterly alien to our Constitution.

6. To be sure, this suggestion is couched in the form of an ostensibly modest recommendation that this Court "return the law to the condition in which it was before *Roe* v. *Wade* was decided." GB 24. But that simply begs the question. For, unless the "condition" of the law, prior to the 1973 abortion

decision, indeed entrusted state legislatures with judicially unreviewable and constitutionally unfettered control over personal matters of family composition and reproductive choice, what the Government proposes would *not* be merely a restoration of the *status quo ante* but a revocation of the very principles from which *Roe* v. *Wade* sprang. For the Court now to overrule *Roe* v. *Wade* would then be not just "a significant step backwards," *cf. Runyon* v. *McCrary*, 427 U.S. 160, 191 (1976) (Stevens, J., concurring), but a repudiation of the 50-year path along which this Court located its 1973 abortion ruling.

7. The central question to be addressed, then, is whether an overruling of *Roe* v. *Wade* would, as the Government asserts, merely turn the clock back to 1973 by erasing what it calls "an erroneous point of departure," GB 2, from the "generally propitious journey," *id.*, along which constitutional law had traveled up to 1973 — or whether *Roe* v. *Wade* was instead a natural step along that journey,[9] so that its overruling would entail a far more substantial retreat, propelling the Court and the country onto a legal landscape from which not only *Roe* but many of its important antecedents, and the protections they provide for us all, would tragically be absent.

8. That *Roe* was indeed a natural outgrowth of a gradual process of legal evolution can hardly be doubted. Its origins, as the Court made clear in the *Roe* opinion, included a series of landmark Supreme Court rulings affirming for all of us the liberty to decide for ourselves when and whether to marry, *see Loving* v. *Virginia*, 388 U.S. 1 (1967), how to raise and educate our children, *see Meyer* v. *Nebraska*, 262 U.S. 390

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[9] The carefully selected citations of academic commentators on *Roe* v. *Wade*, see GB 24 n.4, certainly do not show the contrary. The "broad spectrum of constitutional scholars" said by the Government to share its "judgment" that *Roe* v. *Wade* rested on a "basis . . . so far flawed that this Court should overrule it," *id.* (footnote omitted), is particularly misleading in its calculated exclusion of all the scholars who have written in support of the basic holding in *Roe*.

(1923); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), and how much of our most personal lives to disclose to the world, *see Katz* v. *United States*, 389 U.S. 397 (1967), as well as the right to decide whether to conceive or bear children, *see Skinner* v. *Oklahoma*, 316 U.S. 535 (1942); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). These decisions comprehensively protect our rights both to be left alone by government and to choose how to conduct our own lives. To overturn *Roe* v. *Wade* as the Government urges thus would turn the clock back not just to 1973 but to a point prior to 1923; it would not only deprive women of their fundamental liberty, but would also cast into grave doubt the continuing validity of every one of the Court's half-century of privacy decisions, which protect us all.

9. To resist this conclusion, the Government suggests that *Roe* v. *Wade* represented an unwarranted leap beyond the many "'privacy' cases that the Court cited" in that decision. GB 28. The inference is that the Court could simply jump back to the point from which *Roe* had supposedly "leapt." But the "story" the Government would have the privacy cases tell, *id.* at 27 — in contrast to the message this Court read in them — is strange indeed. As the Government would have it, for example, this Court's 1965 decision striking down a state ban on contraception, *Griswold* v. *Connecticut*, 381 U.S. 479, represented little beyond judicial protection of the "'privacy of the home.'" GB 28 n.6. The Government has evidently mistaken Justice Douglas' evocative language in *Griswold* — "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?"[10] — for the actual holding in that case. It has long been understood that even the Fourth Amendment, into whose Procrustean bed the Government seeks to shove *Griswold*, "protects people, not places," *Katz* v. *United States*, 389 U.S. 347,

[10] 381 U.S. at 485.

351 (1967). And even before *Katz* was decided, this Court recognized in *Griswold* itself that what was being protected was not the sanctity of the suburban bedroom, but the "intimacies of the marriage relationship." 381 U.S. at 502-03 (White, J., concurring); *see id.* at 482, 486 (opinion of the Court); *id.* at 486, 495 (Goldberg, J., concurring).

Even if we accept *arguendo* the Government's misreading of *Griswold*, the Government still cannot simultaneously defend that case and urge that this Court cede to state legislatures a judicially uncontrollable power to prohibit all abortion, from the "moment" of conception, whether performed surgically or through the use of "a substance or device" that operates as an "abortifacient." GB 14. Any such power, notwithstanding the Government's bald assertion to the contrary, would necessarily entail an even greater risk of the "repulsive searches," GB 28 n.6, that the Government adduces in support of this Court's holding in *Griswold*. *Roe* relied heavily on *Griswold* in no small part because of the "problems . . . posed . . . by new embryological data that purport to indicate that conception is a 'process' over time, rather than an event, and by new medical techniques such as menstrual extraction, the 'morning-after' pill, implantation of embryos, artificial insemination, and even artificial wombs." 410 U.S. at 161 (footnote omitted). In the biological context of human conception, state efforts to ferret out prohibited abortions — as defined by the Government — would require not only searches of bedrooms for telltale "morning-after" pills, but also searches of women's bodies for intrauterine devices or other birth control technologies that operate during or after fertilization.

10. In any event, the Government's absurdly narrow conception of privacy is flatly at odds with this Court's unbroken line of precedent. No risk of overbearing searches was entailed in *Griswold's* other direct progeny, *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972), which the Government oddly describes as merely applying "accepted principles . . . of equal protection,"

GB 29 (footnote omitted),[11] and *Carey* v. *Population Services International*, 431 U.S. 678 (1977), or in the other antecedents of *Roe* v. *Wade* — the decades of decisions, beginning as early as 1923 and continuing through the 1960s, establishing a sphere of individual freedom over intimate matters of reproduction, parenting, and family structure. The Government's efforts to sweep these long-standing precedents under the rugs of equal protection and freedom of expression, GB 29, must, with all respect, be described as ill-informed or worse. For nothing in the demand that government rule impartially, or in the requirement that it tolerate dissent, could remotely explain this Court's unbroken line of holdings, both before *Roe* v. *Wade*[12]

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[11] *Baird* struck down a state statute making it illegal for single persons, but not for married persons, to obtain contraceptives in order to prevent pregnancy. Virtually every commentator on the case, including the very authors the Government cites in its brief, *see* GB 24 n.4, has recognized that *Baird* cannot be defended in standard "equal protection" terms but rests unavoidably on the premise that there exists a special freedom to obtain and use contraceptives — a freedom that goes beyond both the marital relationship and the privacy of the home. *See, e.g.*, J.H. Ely, *Democracy and Distrust* 126 n. (1980); Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 *Harv. L. Rev.* 1, 34-36 (1972); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 *Yale L. J.* 221, 296-97 (1973). To describe this case as a standard application of settled equal protection principles is to ignore this analysis — and to ignore the Court's own words in *Baird*: "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." 405 U.S. at 453 (emphasis in original).

[12] To dismiss such decisions as *Meyer* v. *Nebraska*, 262 U.S. 390 (1923), and *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), for example, as simple First Amendment cases, *see* GB 29 n.8, is little short of astonishing. The First Amendment had not yet been applied to the states when those opinions were written; their explicit invocation of parental and family autonomy, rather than freedom of expression, to explain the Court's invalidation of state laws interfering with the education and upbringing of children was properly stressed as decisive by Justice Harlan in his landmark analysis of *Meyer* and *Pierce*. See

and after,[13] unless one were to posit judicially enforceable rights of individuals and families to shape their future, to determine their composition, and to decide whether to bring children into the world — even when local or statewide political majorities would decree different choices.

11. That these rights may be no more than "implied and inchoate" in the Constitution's text, structure, and history, GB 27, and may not be as "directly rooted in textually specified constitutional values" as are some other rights, *id.* at 28, is beside the point in a Constitution whose very text specifies that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Amendment IX. Indeed, the position the Government invites this Court to take would directly violate the rule of construction mandated by the Ninth Amendment.

12. That the Constitution's text provides, in its "liberty" clause, the essential starting point for the judicial development of the series of rights this Court has protected from 1923 through *Roe* and beyond is not open to dispute. Thus, as the Government recognizes, "[t]he ultimate textual source for *Roe* v. *Wade* . . . is the Fourteenth Amendment's guarantee: 'nor shall any State deprive any person of . . . liberty . . . without

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Poe v. *Ullman*, 367 U.S. 497, 550-52 (1961) (dissenting opinion). And to dismiss *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942), as just another equal protection case, *see* GB 29 n.7, is hardly less remarkable, given the *Skinner* Court's explicit reliance upon reproductive freedom as "one of the basic civil rights of man," 316 U.S. at 541, in justifying its unusually strict scrutiny of the Oklahoma criminal sterilization law's distinction between larcenists and embezzlers.

[13] *See, e.g.*, *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977) (relying on *Meyer*, *Pierce*, *Skinner*, *Griswold*, and *Roe* to invalidate a zoning law that interfered with a grandmother's choice to live with her grandson); *Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632, 639-40 (1974) (relying on *Meyer*, *Pierce*, *Skinner*, *Griswold*, *Baird*, and *Roe* to invalidate an employment restriction operating against pregnant women and thus burdening the woman's decision to bear a child).

due process of law.'" GB 25. In this majestic command the Government sees no "apparent textual meaning" beyond a prohibition against "government's actually taking hold of a person, as to confine him, without fair procedures." *Id.* That criminal prohibitions upon abortion "actually take hold of" a woman's person — her body, her life — and, in the most literal sense, confine her "liberty," cannot be doubted. And that "due process of law" requires more than "fair procedures" whenever the state acts to confine a person's basic liberty was accepted even by the Justices who dissented in *Roe* v. *Wade*[14] — and indeed has been accepted by the entire Court ever since the late 19th century.

13. So too, the fact that "state laws condemning or limiting abortion were very general at the time the Fourteenth Amendment was adopted," GB 25, even excusing the exaggeration,[15] would no more immunize such laws from Fourteenth Amendment scrutiny than the general acceptance of state laws segregating the races in public schools or in marital relations at the time of the Fourteenth Amendment's adoption immunized *those* laws from such scrutiny. *See Brown* v. *Bd. of Educ.*, (*Brown I*), 347 U.S. 483 (1954); *Loving* v. *Virginia*, 388 U.S. 1 (1967).[16]

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[14] *See, e.g., Roe*, 410 U.S. at 173 (Rehnquist, J., dissenting but agreeing that the "due process clause . . . undoubtedly does place" substantive limits on "legislative power" to ban abortions); *Griswold* v. *Connecticut*, 381 U.S. 479, 502 (1965) (White, J., concurring in the judgment).

[15] *See Roe*, 410 U.S. at 138-39.

[16] *See also City of Cleburne, Tex.* v. *Cleburne Living Center*, 105 S.Ct. 3249, 3268-69 (1985) (Marshall, Brennan and Blackmun, JJ., concurring in part and dissenting in part): "Courts . . . do not sit or act in a social vacuum. Moral philosophers may debate whether certain inequities are absolute wrongs, but history makes clear that constitutional principles of equality, like constitutional principles of liberty, property, and due process, evolve over time; what once was a 'natural' and 'self-evident' ordering later comes to be seen as an artificial and invidious constraint on human potential and freedom. Compare

14. Nor is there any substance to the Government's argument that the very lines this Court has drawn in the course of elaborating the basic right upheld in *Roe* v. *Wade* somehow demonstrate that the issues posed are unfit for judicial determination. *See* GB 20-23. Once it is agreed, for example, that a law prohibiting "abortion even where the mother's life is in jeopardy" would violate the Fourteenth Amendment, *see Roe* v. *Wade*, 410 U.S. at 173 (Rehnquist, J., dissenting), this Court can find no escape from drawing complex lines between permissible and impermissible abortion prohibitions. Differences will remain over *where* this Court should draw those lines, but the only way to extricate the Court from the entire line-drawing enterprise is to hold that federal courts must accept as conclusive any legislature's determination that any given restriction of abortions serves legitimate purposes that warrant the resulting intrusion upon liberty. Whether or not, as the Government asserts, those who wrote and ratified the Fourteenth Amendment "would have been surprised . . . to learn that they had put any part of such subjects beyond the pale of state legislative regulation," GB 26 — a position never taken by this Court — surely the Amendment's authors would have been shocked to learn that they had put any major sphere of human liberty beyond the pale of federal judicial protection.

15. The Government's most telling point with regard to the line-drawing *Roe* has required seems to be that such notions as fetal "viability" reflect considerations of a medical or technical sort more suitably addressed by legislatures than by courts, particularly since "[t]here is no obvious constitutional connection between the ability of a fetus to survive outside the

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Plessy v. *Ferguson*, 163 U.S. 537 (1896), and *Bradwell* v. *Illinois*, 16 Wall. 130, 141 (1873) (Bradley, J., concurring) with *Brown* v. *Bd. of Educ.*, 347 U.S. 483 (1954) and *Reed* v. *Reed*, 404 U.S. 71 (1971). Shifting cultural, political, and social patterns at times come to make past practices appear inconsistent with fundamental principles upon which American society rests. . . ."

womb, and the magnitude of a state's lawful concern to protect future life." GB 22. But that misses the entire point of what this Court held in *Roe* v. *Wade*: there *is* an obvious constitutional connection between the ability of a fetus to survive outside the womb and the nature of a woman's right to decide whether to bear a child. For it is *only* with respect to a fetus that is not yet viable that a ban on abortion compels a woman to dedicate her body and future to the survival of the unborn. And the fact that "viability" is a moveable point that "changes with advancing technology," GB 23, far from making the Court's standard "unworkable" or "disturbing," *id.*, has long helped to justify *Roe* v. *Wade's* trimesterization against the charge that it represented an arbitrary exercise in judicial line drawing. Thus, it has been clear since the time *Roe* was decided that, to the extent society as a whole becomes willing to invest sufficient resources in the protection of the unborn and newly born — a willingness likely to be reflected by the advancing line of viability — *Roe* might permit greater state protection of the fetus to follow. Seen in this light, *Roe* has from the outset reflected not so much an absolute rejection of the sanctity of "life" from the moment of conception as a structuring of how a value choice on that subject may be made consistent with constitutional principles. Society's claim of a constitutionally dominant interest in fetal life is made commensurate with society's genuine and general exertion to further that interest — not with its willingness to give the interest token recognition by legislatively condemning women to bear unwanted children or to abort under hazardous and illegal conditions.[17]

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[17] *See* Tribe, "Structural Due Process," 10 *Harv. Civ. Rights-Civ. Lib. L. Rev.* 269, 297 (1975). More generally, in defining "limits [that] leave the individual a significant private sphere to live his life," the standards one evolves, rather than being "fixed and neutral," might *have* to draw on "the changing political and economic arrangements of the subject society. . ." Fried, "Is Liberty Possible?" *III The Tanner Lectures on Human Values* 100, 109 (1982). As Professor Fried correctly noted in 1982, "it is a serious mistake to be disturbed by this." *Id.* at 109.

Conclusion.

In dramatizing its plea that *Roe* v. *Wade* be buried by this Court, the Government exhumes the ghost of *Lochner* v. *New York*, 198 U.S. 45 (1905), *see* GB 29, but nowhere explains why it deems the right to decide whether to bear and beget a child to be indistinguishable from the right to hire another for a substandard wage. In citing Justice Holmes' aphorism in *Lochner* that the Constitution is "made for people of fundamentally differing views," and that "the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion," 198 U.S. at 76 (dissenting opinion), the Government conveniently omits Justice Holmes' closing caveat: "unless . . . the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law." *Id.* Statutes unduly restricting a woman's ability to decide whether or not to bear a child do infringe precisely such "fundamental principles." Accordingly, *Roe* v. *Wade* — a decision entirely faithful to that tradition — should be followed in the cases currently pending before this Court.

Respectfully submitted,

LAURENCE H. TRIBE
Counsel of Record
SUSAN ESTRICH
MARTHA MINOW
KATHLEEN M. SULLIVAN
Counsel for Amici
1525 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4621

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